



Richard J. Codey
Acting Governor

State of New Jersey
Department of Community Affairs
Division of Codes and Standards
PO Box 802
Trenton, New Jersey 08625-0802



Susan Bass Levin
Commissioner

BULLETIN NO.

05-1

Date: **June 2005**

Subject: **Issuance of Notice of Violation
After Issuance of Certificate of
Occupancy and Transfer of Title**

Reference: **N.J.A.C. 5:23-2.14, 2.30, and
4.5**

In the Supreme Court decision, DKM Residential Properties Corporation v. The Township of Montgomery and the Construction Board of Appeals of the Township of Montgomery, the Court holds that local code enforcement agencies may issue Notices of Violation to the builder after the Certificate of Occupancy (CO) has been issued and the builder has transferred title to the property. This Supreme Court decision reverses the decision made by the Appellate Division in 2003. (Bulletin No. 03-6, which was issued as a result of this previous Appellate Division decision, has been withdrawn and is replaced by this bulletin.)

The following instructions are intended to aid in the enforcement of the Uniform Construction Code (UCC) as authorized and directed by this decision. As stated above, the Court held that Notices of Violation may be issued to the builder after issuance of the CO and transfer of title. The decision requires that any violation that would have caused the CO to be withheld must be cited. Because no CO would be issued when there are any known violations, this means that a Notice of Violation should be issued for any and all code violations found by or brought to the attention of the local enforcing agency.

1. Go to Warranty first.

For items covered by a homeowner's warranty, filing a claim under the warranty is more advantageous to the owner. For this reason, the homeowner should be advised to go through warranty first when the construction official knows that an item is covered. If it is determined that a particular item is a warranted defect, then the builder must correct the problem; if the builder fails to do so, the warranty company pays for correction of the problem. Clearly, this affords better protection to the homeowner than the issuance of a Notice of Violation under the UCC. Prior to issuing a Notice of Violation for any residence covered by a homeowner's warranty, a copy of a letter of denial from the warranty company should be obtained to ensure that this

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avenue for remediation has been exhausted first. If the warranty claim has been denied, then a Notice of Violation may be issued. If the violation involves an item that the construction official knows is not covered by warranty or if the coverage period for that item has passed, then the Notice of Violation may be issued without waiting for a denial from the warranty company. If the construction official is unsure as to whether an item is under warranty, then the Notice of Violation should be issued. If, after having been advised by the construction official of the advantages of filing a warranty claim, the homeowner still wishes to pursue correction through the UCC, then the construction official should ask that the homeowner sign a statement (sample attached) to document this, and issue the Notice of Violation.

2. Do not issue a Notice of Violation if there is litigation pending.

If the construction official knows that a homeowner has filed suit over the item(s), no Notice of Violation should be issued. Once a homeowner has placed an item before a court, then only the court can resolve it. Courts outrank local enforcing agencies in the scheme of things.

3. Serve the Notice on both the builder and the homeowner.

The Supreme Court decision reemphasized that these Notices must be served upon both the builder and the owner. (The decision references N.J.A.C. 5:23-2.30(b)1.) This is important in that it gives both the builder and the owner standing to appeal. Any disputes should go to the board of appeals. The municipal enforcing agency is not a forum for resolution of these disputes. And, if there is to be any meeting with the municipal enforcing agency regarding the Notice of Violation or the permit application for the work to correct any violations, both the builder and the homeowner should be invited to attend.

The decision also contains a reminder that the statute of repose continues to apply. In essence, this means that the builder cannot be served with a Notice of Violation more than ten years after the issuance of the CO.

4. Include any and all code violations.

As stated above, the decision dictates that a Notice of Violation be issued for any code violation found. Violations should be based upon the model codes adopted at the time of the building's construction (see permit application). If there is doubt as to whether a particular item should be the subject of a Notice of Violation, the construction official should err on the side of caution and issue the Notice of Violation. Again, the board of appeals is the forum for the resolution of any disputes. In a board of appeals hearing, both the homeowner and the builder will have an opportunity to state their cases.

5. Make a separate list in the space provided on the Notice of any item that is part of the homeowner's complaint, but is not a violation of the UCC.

In some instances, the homeowner's complaint will include items that do not constitute violations of the UCC. The Notice of Violation (UCC F213) provides a separate place to list any items included in a complaint from a homeowner that the municipal enforcing agency finds are not code violations. Making a formal, written determination that these items are not violations of the UCC, by listing them in the space provided on the form, will enable the homeowner to appeal that determination to the board. Even if no violations are found, this portion of the form should still be completed to preserve the homeowner's appeal rights.

6. Require development-wide action on certain deficiencies.

When a homeowner complains about code violations found after occupancy, the complaint should be handled, and any Notices of Violations should be issued, on a case-by-case or a complaint-by-complaint basis. However, there are certain violations that involve life safety, and are serious enough to warrant citing every home in the development found to have such violations and requiring that the violation be abated by the owner if the builder is unwilling, unable, or unavailable to do so. The list of code sections that would require global (development-wide) and absolute (must correct) action is found in the UCC at N.J.A.C. 5:23-4.5(h)4. For any violation of a code section listed there, it is necessary to go beyond the home that is the subject of the instant complaint and to include any other homes in the development that have or might have similar violations. For purposes of applying the provisions of N.J.A.C. 5:23-4.5(h)4.i., "unsafe structure" should be deemed to include structurally unsafe. In the case of a residential structure, this means that a structural deficiency is present or likely to occur that has the potential for injury or significant damage to the livability of the home. Any structural member that exceeds the permitted deflection established in the Rehabilitation Subcode at N.J.A.C. 5:23-6.5(c)1.i. should also be considered structurally unsafe.

7. Require a permit application with a signed consent form for all corrective work undertaken.

To protect the homeowner's rights in any corrective work to be done, a permit must be required for all work performed by the builder to abate the violations listed on the notice post CO, even work otherwise not requiring a permit. Any other provision of the UCC to the contrary notwithstanding, a permit is needed for any corrective work required as the result of a Notice of Violation issued after the CO. Prior to the issuance of a permit in connection with such work to the builder, a completed consent form (UCC F101) signed by the owner must be submitted. The completion of this form will ensure that the owner has granted permission for the builder to perform the work that is

described in the permit application, subject to the review and approval of the local enforcement agency for code compliance.

8. Issue a Notice and Order of Penalty to the builder, with a copy to the homeowner, when the time allowed to abate violations expires.

Whenever the time allowed in the original Notice of Violation and Order to Terminate has expired and the violation(s) remain unabated, a Notice and Order of Penalty (UCC F214) should be issued to the builder, and a copy sent to the homeowner. If the builder has not complied with the Notice of Violation and Order to Terminate because of the refusal of the owner to give consent, then this will represent grounds for the builder to appeal. The board of appeals will be asked to inform the homeowner of the place, time, and date of any hearing. Again, this will afford both parties an opportunity to be heard by the board of appeals. The board will then rule on any dispute as to the proposed scope of work, or as to whether access has been unreasonably denied by the homeowner. The Notice of Violation may then be enforced, rescinded, or revised based on the board's decision.

Should you have any questions regarding the applicability of this decision to any specific enforcement action, please contact the Office of Regulatory Affairs at (609) 984-7672.

Property Address: _____
Municipality: _____
Block: _____
Lot: _____

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I/We, the owner(s) of the above property, acknowledge that I/we have been advised by the local construction official it would be to my/our advantage to file a claim under my/our New Home Warranty because, if it is determined that a particular item is a warranted defect, the builder must correct the problem; if the builder fails to do so, the warranty company pays for correction of the problem, rather than having the construction official issue a Notice of Violation and Order to Terminate addressing the same item. But, I/we have chosen to request that the construction official issue such Notice and Order at this time.

(owner) _____

(owner) _____

Date: _____

Witness:

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